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Boswell, G.M.
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IN THE

INFERIOR COURTS:

IN A LETTER ADDRESSED TO

The Honourable Robert Baldwin,

ATTORNEY GENERAL, &c.

BY G. M. BOSWELL,

JUDGE OF THE UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM.

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LAW REFORM

IN THE INFERIOR COURTS:

ADDRESSED TO THE

Hon'ble Robert Baldwin, Attorney General, &c.,&c.,&c.

SIR,—

Until very recently, I had been undecided how far it is proper for those who hold judicial offices to offer their opinions, uninvited, upon measures brought before the Legislature, although they may affect the Courts over which they exercise jurisdiction.

There is no doubt that the legislative and judicial functions should be kept distinct, and the carrying out this principle seemed to me at first sight to involve the consequence that judges should refrain from any expression of opinion with reference to contemplated changes in the laws.

An article in a late number of one of the London Reviews, on the Bankruptcy Laws in England, in which the Judges of the Bankruptcy Courts, are, with one exception, severely censured for not having lent their aid in the promotion of reform in their own courts, upon which the Legislature had been engaged, caused me to reflect more fully on this point; and, though I do not admit that a Judge is properly chargeable with neglect of duty because he does not choose to join the ranks of that very numerous but discordant party who are clamorous for law reform, I have arrived at the conclusion that he may with perfect propriety make public the result of his experience, when important changes are contemplated in his own courts.

The too prevalent but demoralizing habit of charging impure motives renders this preface necessary, and it may

further be expected that some reason should be given why, amidst the numerous county Judges in this Province, I should feel myself called upon to offer observations on subjects respecting which many of them are probably more competent to express a correct opinion. I am not answerable for their silence, nor bound by it, but I can easily conceive that all of them feel a reluctance to make themselves conspicuous on a subject concerning which, more than perhaps any other that has lately engaged public attention, great and popular errors and very strong prejudices prevail. It happened, however, that I was a member of the Legislature when the law originating the present Division Courts was passed, and recorded my vote in their favour, and the public accounts shew that the business discharged in the courts within my jurisdiction has for several years exceeded that of any of the inferior courts of the Upper Province, with the exception of those of the County of York. As it is not, therefore, presumptuous in me to offer my opinions, I do so in the desire which ought to influence every man to be useful in his proper sphere, and most certainly I am not influenced by any wish for notoriety, for my own taste is opposed to seeing my name in print.

In the remarks I have to make, I will endeavour to be brief, because I wish them to be read, but the subject is one that does not admit of extreme conciseness.

The objects which, it may be presumed, are sought by those who advocate changes in the Courts, are certainty in their decisions, and promptness, simplicity, and cheapness in their practice. The first of these requisites is the most important,—no practice should be adopted that may endanger it, and it is this desirable quality in the administration of our laws which prevents in matters of importance that perfect simplicity of procedure asked for by those who have not sufficiently considered how unsafe all transactions would be if prompt decisions were obtained by the substitution of crude ill-considered opinions for those

mature judgements founded on well-considered precedents which are insured in our superior courts, not only by the legal attainments of the judges but by the mode of proceeding which the constitution of the courts requires. It is not my province, however, to combat attempted changes or offer suggestions with regard to the practice of the superior courts. I desire to confine my remarks to the courts of inferior jurisdiction, and I have no favorite theory to advocate in opposition to cheap law and prompt remedies in either of them—for my opinion is, that means of redress through the law ought to be always as cheap and prompt as its just administration will admit. The requisites I have alluded to of promptness, simplicity and cheapness may with great ease and propriety be adopted in courts of small jurisdiction and where the amount in question is very trifling they may be carried with safety to almost any extent. The remark, too, is perfectly just, if you take away from such courts these requisites, a remedy where small amounts are in question cannot be had at all. Long delay and increased costs would naturally drive every suitor for trifling sums out of court.

With regard to the Division Courts, I may justly claim for them that the practice pursued is as free from unnecessary forms and the remedy they give is as prompt as can be attained. In these Counties, fifty-two Division Courts are held during the year. On an average, eighty cases are disposed of at each court. In no instance within five years has a sitting in any of these courts occupied more than eight hours, although sometimes a docket of upwards of four hundred cases had to be gone through. From what I hear of the Division Courts in other Counties, a nearly similar result in proportion to the number of suits tried is obtained.

The cheapness of the courts is demonstrable in the fact that the average cost in each suit contested, previous to execution, but including bailiff's and witnesses fees, is only eight shillings and ten pence. If proof be required that the

decisions are equally satisfactory, it may be found in the fact that although a jury may be had by either party, one is scarcely ever required. In these Counties the jury cases barely average one in three hundred and fifty, and I believe the proportion not to be larger in other counties.

It is not reasonable to suppose that parties would so uniformly trust the same tribunal, when a choice is given to them, if they had not confidence in it. I do not pursue this part of the subject further, because I believe it to be admitted that these courts well answer their object, and the best tribute to their usefulness is found in the fact that your Government has introduced during the present session a measure intending to increase the jurisdiction of the Division Courts more than twice the present amount. But the question really important to answer is, what effect ought to be given to a result thus satisfactory? An almost uniform reply has been received to this question, and if we may judge from the new Division Court Bill, it has been adopted by your Government. This reply may be stated in these words, "It having been found that just decisions may summarily and cheaply be obtained in the Division Courts, let their jurisdiction be increased, so that in matters of larger moment the same desirable result may be obtained." It is to this proposition so generally made that I am principally anxious to address myself, and it is probable that I might not have troubled you at all on this occasion if I could have brought my mind to agree to it. Why is it that these courts have so well fulfilled their purpose? To me the reason is obvious. It is because the practice pursued in them is admirably adapted to the small sums over which they have jurisdiction. But it is most illogical to argue, that having well answered as regards these small sums that the same satisfactory result would follow an increase of jurisdiction. I must confess that my experience in them has led me to an opposite conclusion. My belief is that a considerable increase of jurisdiction would render the decisions, practice, and costs of these courts most unsatisfac-

tory, and would in time destroy them altogether. The course of proceeding adopted by myself and most of my brother Judges in the Division Court is this—the parties in a contested case being called, the defendant is asked upon what ground he resists the claim made against him—the answer being given, the enquiry is then generally made of the plaintiff whether he concurs in the defendant's answer, or if not in what respect does he differ from it? The answer to these questions, or those of a similar tendency, applicable to the nature of the case reduces the issue to the narrowest point, and the witnesses and sometimes the parties are then examined under oath; and the testimony being closed, the judgment is rendered immediately, and when necessary with a short statement of the grounds upon which it is given. As a rule no speeches are attempted. A case of doubt or difficulty sometimes arises from conflicting evidence or the nature of the circumstances, which may require a few remarks, and these are always permitted where requisite or likely to throw any light upon an involved subject. As a rule also, professional gentlemen do not attend these courts. They very properly, except in some peculiar cases, deem it derogatory to their profession to do so, and when in these few excepted instances their attendance is deemed requisite, they most properly confine their remarks within the narrowest bounds and do not object to be checked by the Court or interrupted by the Judge when he intimates that his opinion is formed. But the reason of this promptness and this acquiescence is to be found in the smallness of the sum in dispute. In larger matters it would, I believe, be impossible to pursue the same course, nor indeed would it be desirable. At all events, professional gentlemen could not with propriety be expected to abstain from attendance if the jurisdiction were much increased, and in the larger matters they would very properly insist upon their right to be heard at length. The habit of attending the court by the profession having once been formed, it would become an object with them to

obtain retainers in as many cases as possible. Professional assistance obtained by one party would make it necessary to the other and men seeking a livelihood and honestly discharging a duty, though in trifling matters, would necessarily endeavour to make themselves conspicuous for assiduity and perseverance. Every contested case, no matter how small the sum in question, would soon be found to occupy so great a length of time that instead of getting through a docket of four or five hundred cases in eight hours it would occupy as many days, perhaps weeks.—This is no exaggerated view, for eight or ten cases argued at length are as many as the most energetic Judge can try in a day. During this time the suitors, their witnesses and lawyers would be obliged to remain from home, and in some country places necessarily at a small tavern. The tampering with witnesses, the entrapping parties into seeming admissions, and the concocting defences where none were intended would frequently ensue, and how soon simplicity, promptness, cheapness and certainty would be made to vanish under such circumstances is not difficult of conjecture.

To me the conclusion seems inevitable that cases of little moment, and therefore admitting of rapid decision, ought not to be tried at the same courts as those in which questions involving large sums are disposed of. The promptness suitable to minor amounts is altogether unfitted for matters of larger importance, which no Judge would desire to have the responsibility imposed on him of deciding, without grave deliberation and reasonable argument.

I must confess that the hope seems vain to change the current of present prevailing ideas on this subject, and the determination seems to have been arrived at and forced upon the Government, that the jurisdiction of the Division Courts must be considerably extended. I am sorry for it; my own opinion is opposed to any increase of jurisdiction in these courts. If the experiment, however, must be tried, I would suggest as a sufficient extension at first, that

cases of tort to five pounds and matters of contract and debt, in which the sum sought to be recovered is ascertained by the signature of the party, to twenty pounds, leaving its present jurisdiction of ten pounds in all other matters untouched, would be amply sufficient to test the powers of the Court with regard to higher matters. This would add very much to the business of the courts, but the firmness of the Judges and the forbearance of the profession might perhaps make the attempt successful. It would still, however, only be an experiment, and one which I much fear would prove lastingly injurious to these minor courts.

Let me not be misunderstood, I am not an advocate for delay or expense in any of the courts. My proposition is that a court universally acknowledged to answer the object for which it was intended, a court in which the requisites that some ultra law reformers seem to consider alone necessary to make a law-suit a very pleasant thing, have been fully attained, I mean promptness and cheapness—my proposition is that this court should not be wantonly experimented upon, because it has answered the purpose for which it was founded. It answers well, and therefore I would say, let it alone. The suitors in these courts, generally poor—many of whom never have cases involving more than two or three pounds, do not desire to wait for the disposal of their suits day after day until the expenses are equal to the whole claim in dispute. Is it not obvious that such cases cannot conveniently be tried at a court where a large portion of time would be occupied in hearing long arguments and extended evidence upon matters too important in amount to admit of immediate decision? Ten pounds is the utmost sum to which the jurisdiction of a court in this country should be extended, in which the only remedy is given for the recovery of the smallest amount.

I make this statement in the face of the popular movement on the question, with the most perfect conviction that the substitution of a jurisdiction much larger, will in a very short period, render necessary some other tribunal

in which parties can have redress for the smaller sums.—The jurisdiction of the Town Reeves or other local officers, to five pounds might partially remove the difficulty. Cases from five pounds to fifty could be tried by the same tribunal with more advantage than those in which all sums up to twenty-five pounds are included. The proportion of cases in the Division Courts, under five pounds, is nearly two-thirds of all those disposed of.

But if the Division Courts are to be maintained in their present shape, or their jurisdiction only increased to a trifling extent, what plan is to be adopted for the removal of the evils complained of in reference to the costs and delays attending legal remedies in this province? My answer is, reduce the costs, simplify the practice and increase the jurisdiction of the County Courts.

I am bound to admit that these Courts, under their present construction, do not fully answer the purpose for which they were intended, which I suppose to have been to give an expeditious and cheap remedy in cases requiring greater deliberation and care than those entrusted to the Division Courts, but not of the same grave importance as those which ought to occupy the attention of the superior Courts.

The costs in the County Courts are out of proportion to the sums recovered, and the practice pursued in them is unnecessarily clogged with the same forms and nearly the same delays as in the Court of Queen's Bench. This requires a remedy.

It has, I believe, been suggested to abolish these Courts altogether. This, however, could only be accomplished by such an increase of jurisdiction to the Division Courts as would, I am quite certain, eventually destroy them. In preference to this, it would be better to adopt, in the County Courts, the practice of the Division Courts, but keeping them still perfectly distinct tribunals, so that the humble suitor for small sums might not be injured by the experiment. It might be possible, without any other pre-

liminary form than a summons and particulars of claim, to bring the parties to issue *vivâ voce*, and then with or without a jury, according to the desire of the parties, to have the case entered upon at once, but giving all the time to counsel for their addresses, and leaving the examination of witnesses in their hands as at present practised. Such an experiment, giving the County Courts jurisdiction to one hundred pounds, and making them Circuit Courts, might be tried. It might, unfettered with cases under ten pounds, prove successful. I have generally observed, however, that those reforms have almost always succeeded best which have been gradual, where existing structures are not altogether thrown aside, but carefully and skilfully improved upon. I am not therefore sanguine of the success of rash experiments, and it would be rash indeed in so complicated and difficult a subject as the practice of a court of law to adopt a sweeping change; only because it may possibly succeed.

The County Courts may I believe be made most useful, and properly modified would become a favourite tribunal in the pursuit of legal remedies. I would recommend that suits should be commenced as they formerly were in this Court, by summons and declaration united, to which should be added particulars of demand. The former part of this plan was in practice in this court more than twenty years and I never have learnt any satisfactory reason for its having been changed. I would further suggest in this Court that special pleading should be altogether dispensed with. Where very large sums are not in question its expenses and inconveniencies, and the total failure of justice sometimes proceeding from it, more than counterbalance any advantage arising from having the issues to be tried brought in a specific form before the Court. The plea of not guilty in matters of tort, and not indebted in money demands, and notice of set-off, where counter claims exist, might, and in my opinion, ought to be permitted in substitution of all other pleas, and the special matter be given

in evidence under them. To obviate any inconvenience on the ground of surprise, which, however, could not frequently occur, for parties to suits generally know what defence can be insisted on, a short notice of any special defence intended, in any form of words sufficient for the purpose might be required, or if such notice was not given, a discretion might be permitted to the Judge to grant new trials where he was satisfied a party had been prejudiced by the omission, on such terms, regarding the costs, as might be equitable. All demurrers, also, should be abolished; and where the declarations or pleas are substantially informal, application might be made to the Court to set them aside, or orders might be obtained to amend them. After interlocutory judgment, in cases where computation is permissible at all, it might be made imperative to compute either before the Judge or the Clerk, without the intervention of a jury. This simplification of the practice would render the County Courts a favorite resort to suitors, and the consequent diminution of the costs would at once remove all objections made to them hitherto on account of their great expense.

This plan would have great advantage over that of a Court of large jurisdiction, constituted as the Division Court is in this respect;—the preliminary proceedings of appearance, plea and notice of trial would give information to both parties, whether the matter was to be disposed of at a particular Court, and whether any defence was intended. In the Division Court a plaintiff must go prepared with his counsel, if any is employed, and all his witnesses, without knowing whether a defence is to be set up or not. This inconvenience is frequently felt in the small cases over which the Court now has jurisdiction; but as professional men do not attend to create difficulties and make objections, the evil is not great. In cases of importance it would often occasion the greatest embarrassment, and sometimes, in spite of every effort to obviate it, extreme hardship would ensue to defendants by being made charge-

able with costs of witnesses, when they had no intention to resist the demand.

There is only one other subject connected with these Courts, on which I desire to make any observation; I allude to the salaries of the Judges. In the arrangement of these, a fair consideration should be given, not only to the labour he has to perform, but to the great outlay and constant expense that must be incurred by him in the performance of his duties.

In no instance does a County Judge receive one half of the salary paid to the Judges of the superior Courts; but small as the sum is, I am confident no complaint would be heard from any of them on this subject, and most certainly none would be made by me, were it not for the large outlay he is obliged to make, from which, personally, he derives no benefit.

His long detention from home, his travelling expenses, the purchase of horses and winter and summer conveyances, the wear and tear of them consequent upon having to perform his journeys during all seasons, sometimes over roads almost impassable, form an item which, calculated by those who understand it, will be found sufficiently large to claim some consideration at the hands of those who, as trustees for the public, happen to be his paymasters.

It should be recollected, moreover, that many of those officers are not only wholly paid from the fees derived from their labours, but in several instances those fees amount to a sum which permits a return to the revenue of a large amount. A reference to the public accounts will shew these particulars, and there is no reason to doubt that an increase of jurisdiction to the inferior Courts will soon relieve the Provincial revenue altogether from any burthen on account of the County Judges.

There are other circumstances with regard to these officers that ought not to be forgotten, they are altogether restricted from engaging in any business which might assist their income, and they are called on to perform, not

only the duties regularly belonging to their own Courts, but if a Court of Bankruptcy or an Insolvent Debtors' Court is erected they are selected for the performance of the duties of the Judges of these Courts also, and without any additional emolument. It has been found convenient also to give them a portion of the duties of the Judges of the superior Courts. Motions in Chambers relating to suits in the Queen's Bench and Common Pleas are made before the Judges of the County Courts, and for this also no allowance is made to them. I remember when I was a member of the Legislature it was proposed in a Bill which passed the House of Assembly for the purpose of registering electors, to give to the County Judges the duties of revising Barristers in deciding upon the qualification of persons claiming a right to vote, and this also without any pay. They are certainly a most convenient class of officers, and in this age of retrenchment ought to be very much respected for the example they afford of hard working public servants with very small salaries.

I should have considered any remarks on this part of the subject wholly unnecessary if the proposition had not been made in the Division Court Bill, introduced by the Solicitor General, to add very greatly, not only to the labours, but the expenses of the Judges without any provision by which they may be enabled to meet them. The pressure on the Government on the subject of economy may excuse this but it makes it imperative on those who are interested to notice it. I ask only that in any change contemplated in the inferior Courts, proper attention may be given to this subject, nor am I at all desirous that in deciding upon it the principle of the most severe economy in the disposition of the public finances should be lost sight of. The scale of salaries allotted to the Judges of the inferior Courts considered with reference to the labours they are required to perform, and the expenses incurred by them may be fearlessly laid before the most rigid disciple of retrenchment with a claim for favourable consideration

which he will at once admit, unless his peculiar principles have so far perverted his conscience that he fears to do justice.

These observations which I have been prompted to make on a subject of great importance have been hastily thrown together, but are expressive of opinions by no means hastily formed. In the only shape which time at present permits me to put them, they are of course merely suggestive.

To effect great good in matters so complicated and difficult as the constitution and practice of the Courts of Law much time, labour, and expense, must be brought to the task. If the effect of the present movement for Law Reform should be the creation of a commission to whom the task might be entrusted, of enquiring into the constitution and practice of the several Courts and maturing a well digested remedy for the evils complained of, great benefit might reasonably be expected from such a course.

I am,

Your obedient servant,

G. M. BOSWELL.

Cobourg, 20th June, 1850.